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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BARBARA A. PINKSTON,

*Petitioner,*

vs.

SHERYL FOSTER, *et al.*,

*Respondents.*

2:07-cv-01305-KJD-LRL

ORDER

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion (#30) to dismiss, which seeks the dismissal of Grounds 2, 3, 5 and 6 as procedurally defaulted, as well as upon an outstanding motion (#31) for an extension.

***Background***

Petitioner Barbara Pinkston seeks to set aside her 1997 Nevada state conviction, pursuant to a jury verdict, of first degree murder with the use of a deadly weapon.

Respondents previously sought to dismiss, *inter alia*, Grounds 2, 3, 5 and 6 for lack of exhaustion. Petitioner contended in response, *inter alia*, that the claims were exhausted because they were procedurally defaulted, maintaining that "[a]ny post-conviction petition filed now would be vigorously argued by Respondents to be both untimely and successive."<sup>1</sup>

In its order on the earlier motion to dismiss, this Court noted that the standards for avoiding a procedural bar in the Nevada state courts are substantially the same as the standards applied in federal court. Accordingly, the Court, in prior cases, has declined to hold

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<sup>1</sup>#28, at 22.

1 that claims were exhausted on the basis that they would be procedurally barred in Nevada  
2 state court absent an unequivocal stipulation that the petitioner would not be able to  
3 demonstrate cause and prejudice to overcome the state procedural bar in the Nevada state  
4 courts, that the petitioner could not avoid the state procedural bar on a showing of actual  
5 innocence, and that the procedural bars otherwise now are consistently applied by the  
6 Nevada state courts. In the absence of such concessions, the Court has declined to hold that  
7 there is no possibility that unexhausted claims would be considered by the Nevada state  
8 courts based upon a state procedural bar.<sup>2</sup>

9 The Court found that the present case was distinguishable, however, as to Grounds  
10 2, 3, 5 and 6. The Court noted that the only argument that would appear to be practically  
11 available to petitioner for overcoming a state procedural bar as to these substantive claims  
12 would be a claim of cause and prejudice based upon ineffective assistance of appellate  
13 counsel in failing to raise the substantive claims on direct appeal. On a prior state post-  
14 conviction petition, the Supreme Court of Nevada rejected petitioner's claims that appellate  
15 counsel was ineffective for failing to raise the underlying substantive claims on direct appeal.  
16 This Court concluded that "[t]he likelihood that the Supreme Court of Nevada would revisit its  
17 holding on the ineffective assistance claim rather than apply the law of the case doctrine to  
18 a claim of cause and prejudice based upon such alleged ineffective assistance is virtually nil."<sup>3</sup>  
19 The Court accordingly held that Grounds 2, 3, 5 and 6 were technically exhausted because  
20 the substantive claims would be procedurally barred in the state courts, subject to  
21 respondents' ability to pursue a motion to dismiss the claims in federal court on the basis of  
22 procedural default.<sup>4</sup>

23 In the present motion, respondents seek the dismissal of these grounds on the basis  
24 that they would be barred under Nevada law as "both untimely and successive." #30, at 6.

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26 <sup>2</sup>#29, at 6-7.

27 <sup>3</sup>E.g., #29, at 8.

28 <sup>4</sup>#29, at 8, 10-11, 14 & 15.

### **Governing Law**

Under the procedural default doctrine, federal review of a habeas claim may be barred if the state courts rejected the claim on an independent and adequate state law ground due to a procedural default by the petitioner. Review of a defaulted claim will be barred even if the state court also rejected the claim on the merits in the same decision. Federal habeas review will be barred on claims rejected on an independent and adequate state law ground unless the petitioner can demonstrate either: (a) cause for the procedural default and actual prejudice from the alleged violation of federal law; or (b) that a fundamental miscarriage of justice will result in the absence of review. *See, e.g., Bennet v. Mueller*, 322 F.3d 573, 580 (9<sup>th</sup> Cir. 2003).

To demonstrate cause, the petitioner must establish that some external and objective factor impeded his efforts to comply with the state's procedural rule. *E.g., Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); *Hivala v. Wood*, 195 F.3d 1098, 1105 (9<sup>th</sup> Cir. 1999). To demonstrate prejudice, he must show that the alleged error resulted in actual harm. *E.g., Vickers v. Stewart*, 144 F.3d 613, 617 (9<sup>th</sup> Cir. 1998). Both cause and prejudice must be established. *Murray*, 477 U.S. at 494, 106 S.Ct. at 2649.

### **Discussion**

#### **Applicable State Procedural Bars**

Petitioner urges, first, as follows:

Given that this Court has found, and Respondents have agreed, that the Nevada Supreme Court would decline to review the merits of Ms. Pinkston's grounds for relief on the basis that it has done so already, i.e., because of law of the case, no bar to federal habeas review has resulted. *Cone v. Bell*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1769, 1781 (2009); *Ylst v. Nunnemaker*, 501 U.S. 797, 804, n.3 (1991).

#32, at 4.

Petitioner misstates the Court's prior holding.

This Court made no holding that the state supreme court would decline to review the merits of the substantive claims in Grounds 2, 3, 5 and 6 by applying law of the case doctrine to those substantive claims.

1 The Court instead held that “[t]he likelihood that the Supreme Court of Nevada would  
 2 revisit its holding on the *ineffective assistance claim* rather than apply the law of the case  
 3 doctrine to a *claim of cause and prejudice based upon such alleged ineffective assistance* is  
 4 virtually nil.”<sup>5</sup> Petitioner, in opposing the prior motion to dismiss on the basis of exhaustion,  
 5 posited that the state supreme court would reject the substantive claims in Grounds 2, 3, 5  
 6 and 6 as “both untimely and successive.” This Court held that the chances that the state  
 7 supreme court would find that petitioner could establish cause and prejudice as to *these*  
 8 procedural bars were virtually nil because that court already had rejected claims that appellate  
 9 counsel had been ineffective for failing to raise the substantive claims on direct appeal.  
 10 Respondents now seek the dismissal of the substantive claims as procedurally defaulted  
 11 because they would be found untimely and successive, not on the basis of law of the case.

12 This Court, again, made no holding that the substantive claims in Grounds 2, 3, 5 and  
 13 6 would be barred by law of the case if he returned to state court. Respondents’ present  
 14 motion to dismiss similarly is not based upon a premise that the law of the case would be  
 15 applied to the substantive claims. *Cone* and *Ylst* have nothing to do with this case.<sup>6</sup>

#### 16 ***Adequate State Law Ground***

17 Petitioner next contends that the procedural bars that were invoked by respondents,  
 18 under N.R.S. 34.726 and N.R.S. 34.810, do not constitute “adequate” state law grounds for  
 19 purposes of the procedural default doctrine. Petitioner contends that the procedural bars  
 20 were not clear, consistently applied, or well-established.

21 In order for a state procedural rule to be “adequate” to support the state court  
 22 judgment, the state rule must be clear, consistently applied, and well established at the time  
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24 <sup>5</sup>E.g., #29, at 8 (emphasis added).

25 <sup>6</sup>An argument based upon such a misstatement of the Court’s prior holding is, at best, unpersuasive.

26 Petitioner rehashes an argument from the earlier motion to dismiss that the state supreme court’s  
 27 rejection of the claim of ineffective assistance of appellate counsel constituted a rejection of the substantive  
 28 claim, such that the underlying substantive claim was exhausted. This Court rejected all such arguments.  
 See, e.g., #29, at 11. Exhaustion of a claim of ineffective assistance of appellate counsel does not exhaust  
 the underlying substantive claim.

1 of the petitioner's purported default. *See, e.g., Collier v. Bayer*, 408 F.3d 1279, 1284 (9<sup>th</sup> Cir.  
2 2005). A state law procedural rule is adequate if the state courts followed the rule "in the vast  
3 majority of cases" during the relevant time. *Dugger v. Adams*, 489 U.S. 401, 410 n. 6, 109  
4 S.Ct. 1211, 1217 n.6, 103 L.Ed.2d 435 (1989); *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9<sup>th</sup>  
5 Cir. 1996). A demonstration that the state courts allegedly departed from a consistent  
6 application of the state procedural rule in only a "few cases" fails to establish that the state  
7 courts do not regularly and consistently apply the procedural rule. *Dugger*, 489 U.S. at 410  
8 n.6, 109 S.Ct. at 1217 n.6 (the Supreme Court held that the state procedural rule constituted  
9 an adequate state law ground where the habeas petitioner presented only five cases with  
10 arguably inconsistent applications of the rule).

11 In *Bennett v. Mueller*, 322 F.3d 573 (9<sup>th</sup> Cir. 2003), the Ninth Circuit established a  
12 burden-shifting analysis for determining whether a state procedural rule constitutes an  
13 adequate state law ground for purposes of the federal procedural default doctrine. Under  
14 *Bennett*, the State has the ultimate burden of proving the adequacy of the state procedural  
15 bar. However, the petitioner initially must come forward with case law allegedly demonstrating  
16 inconsistent application of the rule:

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18 Once the state has adequately pled the existence of an  
19 independent and adequate state procedural ground as an  
20 affirmative defense, *the burden to place that defense in issue*  
21 *shifts to the petitioner*. The petitioner may satisfy this burden by  
asserting specific factual allegations that demonstrate the  
inadequacy of the state procedure, *including citation to authority*  
*demonstrating inconsistent application of the rule*. Once having  
done so, however, the ultimate burden is the state's.

22 322 F.3d at 586 (emphasis added).

23 The Court looks first to N.R.S. 34.726(1), which provides for a one-year limitation  
24 period for state post-conviction petitions. When a habeas petitioner challenges the  
25 consistency of a state's application of a time bar, the court must look to the consistency of the  
26 application of the time-bar rule both at the time that the limitations period began running  
27 following the denial of the direct appeal and at the time that the time bar was applied in  
28 denying post-conviction relief. *See, e.g., High v. Ignacio*, 408 F.3d 585, 589 (9<sup>th</sup> Cir. 2005).

1 In this case, the Court thus looks to the consistency of the Nevada Supreme Court's  
2 application of N.R.S. 34.726(1) both at the time that petitioner's direct appeal was denied in  
3 2000 and at the time that the time bar would be applied on state post-conviction review  
4 currently in 2010.

5 The Ninth Circuit consistently has rejected the argument that the Supreme Court of  
6 Nevada inconsistently applies the one-year time bar in N.R.S. 34.726(1) generally for time  
7 periods up through 1996. See *Collier*, 408 F.3d at 1285; *Loveland v. Hatcher*, 231 F.3d 640,  
8 642-63 (2000)(as of 1993); *Moran*, 80 F.3d at 1269-70 (as of 1996); see also *High*, 408 F.3d  
9 at 590 (discussing rejection of the inconsistency argument as to N.R.S. 34.726(1) in rejecting  
10 the same argument regarding an earlier Nevada provision). When the Ninth Circuit has held,  
11 as it held in the foregoing cases with regard to N.R.S. 34.726(1), that the state procedural rule  
12 has been consistently applied, the petitioner then has the burden of citing state court cases  
13 demonstrating a subsequent inconsistent application of the state rule. E.g., *King v.*  
14 *Lamarque*, 464 F.3d 963, 966-67 (9<sup>th</sup> Cir. 2006).

15 In this case, petitioner has not presented any Nevada case law in any way indicating  
16 that – subsequent to the period considered in the foregoing Ninth Circuit authorities – the  
17 Supreme Court of Nevada applied the one-year time bar in N.R.S. 34.726(1) inconsistently,  
18 whether in 2000, in 2010, or at any point in between. Petitioner cites to three Nevada state  
19 cases pertaining to the contemporaneous objection requirement in order to preserve sundry  
20 trial errors for review on direct appeal.<sup>7</sup> These cases have nothing to do with the application  
21 of N.R.S. 34.726(1). Under established law, cases that concern other procedural rules and  
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23 <sup>7</sup>See cases cited in #32, at 12-13. The cited portion of *Koerner v. Grigas*, 328 F.3d 1039, 1047 (9<sup>th</sup>  
24 Cir. 2003), also has nothing to do with the application of N.R.S. 34.726(1) and is inapposite. If petitioner  
25 were to establish that the state courts potentially would overlook the state procedural bars “without any  
26 apparent rhyme or reason,” see #32, at 12, line 19, the predicate for this Court's exhaustion ruling would be  
27 removed. The Court's prior ruling was premised upon there being no possibility of state court review of the  
28 claims at this point. If petitioner were to establish that that is not the case, on the basis that the state courts  
overlook the procedural bars, this Court would vacate its prior order and require petitioner to either dismiss  
the unexhausted claims or seek other appropriate relief to address the mixed petition. Petitioner cannot have  
it both ways. In this context, the claims either are exhausted because they now would be procedurally barred  
in the state courts or there is a possibility that the state courts would hear the claims because they allegedly  
do not consistently apply the procedural bars, such that the claims then are not exhausted.

1 that do not discuss the application of the procedural rule barring an untimely post-conviction  
2 petition “are not relevant” to the question of whether N.R.S. 34.726(1) has been consistently  
3 applied. *Moran*, 80 F.3d at 1270. Petitioner cites no Nevada case law in any way indicating  
4 an inconsistent application of N.R.S. 34.726(1) during the relevant time period, from 2000  
5 through the current time.

6 In the absence of any authority showing that the state courts apply N.R.S. 34.726(1)  
7 inconsistently, the Court must presume that the state procedural rule is adequate. *See High*,  
8 408 F.3d at 590. The Court holds that N.R.S. 34.726(1) constituted an adequate state law  
9 ground at the relevant time for purposes of the procedural default doctrine.

10 The Court therefore need not reach any issue as to whether N.R.S. 34.810 also would  
11 constitute an adequate state law ground in this case.

12 ***Cause and Prejudice***

13 As the Court noted in the prior order, the only argument that would appear to be  
14 practically available for overcoming the state procedural bars to Grounds 2, 3, 5 and 6 is an  
15 argument seeking to establish cause and prejudice based upon ineffective assistance of  
16 appellate counsel in failing to raise the claims on direct appeal.<sup>8</sup>

17 In the opposition to the present motion, petitioner, “for the sake of brevity,” merely  
18 incorporated by reference the allegations of ineffective assistance from the amended petition.  
19 Respondents did not file a reply memorandum. The motion to dismiss otherwise did not  
20 address the particulars of the claims of ineffective assistance of counsel as a basis for a claim  
21 of cause and prejudice, which is a matter as to which petitioner has the burden of proof.

22 The Court thus is presented with minimal specific argument by the parties as to what  
23 is the central issue in adjudicating the application of the procedural default doctrine as to  
24 Grounds 2, 3, 5 and 6. Given that Ground 9 of the amended petition alleges ineffective  
25 assistance of appellate counsel for failure to present these federal substantive claims, the  
26 Court will defer further consideration of the procedural default defense as to these claims until

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28 <sup>8</sup>See, e.g., #29, at 7-8.



1 after the filing of an answer and reply that more fully addresses the related claims of  
2 ineffective assistance of appellate counsel.

3 ***Evidentiary Hearing Request***

4 Petitioner makes a conclusory form request for an evidentiary hearing without  
5 identifying any specific issues warranting an evidentiary hearing on the motion. Adjudication  
6 of claims of ineffective assistance of appellate counsel does not require an evidentiary  
7 hearing. If additional factual material is pertinent to a motion to dismiss, it is incumbent upon  
8 petitioner to tender such facts by affidavit or otherwise with the opposition to the motion. The  
9 request for an evidentiary hearing on this motion is denied.

10 IT THEREFORE IS ORDERED that respondents' motion (#30) to dismiss is DENIED  
11 without prejudice to the Court's further consideration of the procedural default defense as to  
12 Grounds 2, 3, 5 and 6 when it considers the merits of the claims of ineffective assistance of  
13 counsel based upon appellate counsel's failure to raise these substantive claims on direct  
14 appeal.

15 IT FURTHER IS ORDERED that, within forty-five (45) days of entry of this order,  
16 respondents shall file an answer to all remaining claims.

17 IT FURTHER IS ORDERED that, in the answer filed in response to this order,  
18 respondents shall address, separately and distinctly as to each ground under separate  
19 headings for Grounds 2, 3, 5 and 6, petitioner's claim that appellate counsel was ineffective  
20 for failing to raise each such claim on direct appeal. Such discussion shall identify the state  
21 supreme court's holding rejecting the corresponding ineffective assistance claim, together with  
22 argument addressed to the state court record materials supporting the state court decision.  
23 Respondents may cross-reference back to such discussion under Grounds 2, 3, 5 and 6 in  
24 responding to the pertinent portions of the ineffective assistance claims in Ground 9, so long  
25 as respondents otherwise fully respond to the remaining claims in Ground 9. Respondents  
26 need respond to Grounds 2, 3, 5 and 6 only as provided herein, *i.e.*, within the context of the  
27 claim of cause and prejudice based upon alleged ineffective assistance of appellate counsel.  
28 If the Court determines as a threshold matter that petitioner has established cause and



1 prejudice as to a claim or claims based upon ineffective assistance of appellate counsel, the  
2 Court will review the merits of any such underlying substantive claim as a non-defaulted claim  
3 on *de novo* review.

4 IT FURTHER IS ORDERED that petitioner may file a reply to the answer within forty-  
5 five (45) days of service.

6 IT FURTHER IS ORDERED that petitioner's motion (#31) for an enlargement of time  
7 to file an opposition to the present motion to dismiss is GRANTED *nunc pro tunc*.

8 **No extensions of time will be granted to the deadlines established herein absent**  
9 **extraordinary circumstances.**

10 DATED: March 30, 2010

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KENT J. DAWSON  
United States District Judge  
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